IN THE SUPREME COURT OF MISSOURI

THEODORE J. HOFFMAN and DEBORAH L. HOFFMAN,	)	
	)	
Plaintiffs/Appellants,	)	
	)	No. SC86716
-vs-	)	
	)	
UNION ELECTRIC COMPANY, d/b/a AmerenUE, a Missouri Corporation,	)	
	)	
Defendant/Respondent	)	

SUBSTITUTE REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

JURISDICTIONAL STATEMENT

Appellants concur with the jurisdictional statement set forth in AmerenUE's Substitute Brief.

STATEMENT OF FACTS

Appellants concur with the statement of facts set forth in AmerenUE's Substitute Brief, but also direct this Court to the statement of facts set forth in Appellants' appellate brief, for which a substitute brief was not submitted to this Court.

POINTS RELIED ON

I. THE APPELLATE COURT PROPERLY REVERSED THE GRANT OF SUMMARY JUDGMENT ISSUED BY THE TRIAL COURT IN FAVOR OF AMERENUE BECAUSE, AS A MATTER OF LAW, AMERENUE OWED A DUTY TO TIFFANY HOFFMAN TO COMMUNICATE INFORMATION REGARDING THE STATUS OF THE POWER LINE TO RESCUE PERSONNEL AT THE SCENE SO THAT SUCH PERSONNEL COULD MAKE THEIR OWN DETERMINATION AS TO HOW TO PROCEED, IN THAT AMERENUE SHOULD HAVE FORESEEN THAT EMERGENCY PERSONNEL WOULD DELAY THEIR ATTENTION TO THE VICTIMS OF THIS ACCIDENT UNTIL BEING INFORMED OF THE STATUS OF THE ELECTRIC CURRENT IN THE POWER LINE.

Lopez v. Three Rivers Elec. Co-op., Inc., 26 S.W.3d 151 (Mo.banc 2000).

Pierce v. Platte-Clay Elec. Coop., Inc., 769 S.W.2d 769 (Mo.banc 1989).

Rothwell v. West Cent. Elec. Co-op., Inc., 845 S.W.2d 42 (Mo.App. W.D. 1992).

II. AMERENUE'S ARGUMENT THAT THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AMERENUE FOR THE ADDITIONAL REASON THAT PLAINTIFFS' THEORY OF LIABILITY WAS BASED ON PURPORTED EXPERT TESTIMONY THAT DID NOT MEET THE REQUIREMENTS OF SECTION 490.065 RSMO SHOULD BE DENIED OR DISREGARDED, BECAUSE SUCH ARGUMENT VIOLATES RULE 83.08(b) OF THE MISSOURI RULES OF CIVIL PROCEDURE, IN THAT AMERENUE ALTERED THE BASIS OF ITS ARGUMENT CONTRARY TO THE PROVISION OF SAID RULE, WHICH STATES A PARTY SHALL NOT ALTER THE BASIS OF ANY CLAIM THAT WAS RAISED IN THE COURT OF APPEALS BRIEF.

Mo.R.Civ.Pro. 83.08 (2005).

III. THE APPELLATE COURT PROPERLY REVERSED THE GRANT OF SUMMARY JUDGMENT ISSUED BY THE TRIAL COURT IN FAVOR OF AMERENUE, BECAUSE APPELLANTS CAN ESTABLISH CAUSATION, IN THAT TESTIMONY FROM EMERGENCY PERSONNEL EVIDENCES THAT AT LEAST ONE OF THE WORKERS AT THE SCENE WOULD HAVE ATTENDED TO TIFFANY HOFFMAN WITHOUT WAITING FOR AMERENUE TO REMOVE THE LINE HAD HE BEEN INFORMED AS TO THE STATUS OF THE LINE.

ARGUMENT

I. THE APPELLATE COURT PROPERLY REVERSED THE GRANT OF SUMMARY JUDGMENT ISSUED BY THE TRIAL COURT IN FAVOR OF AMERENUE BECAUSE, AS A MATTER OF LAW, AMERENUE OWED A DUTY TO TIFFANY HOFFMAN TO COMMUNICATE INFORMATION REGARDING THE STATUS OF THE POWER LINE TO RESCUE PERSONNEL AT THE SCENE SO THAT SUCH PERSONNEL COULD MAKE THEIR OWN DETERMINATION AS TO HOW TO PROCEED, IN THAT AMERENUE SHOULD HAVE FORESEEN THAT EMERGENCY PERSONNEL WOULD DELAY THEIR ATTENTION TO THE VICTIMS OF THIS ACCIDENT UNTIL BEING INFORMED OF THE STATUS OF THE ELECTRIC CURRENT IN THE POWER LINE.

"In any action for negligence, the plaintiff must establish that the defendant had a duty to protect the plaintiff from injury, the defendant failed to perform that duty, and the defendant's failure proximately caused injury to the plaintiff." Lopez v. Three Rivers Elec. Co-op., Inc., 26 S.W.3d 151, 155 (Mo.banc 2000). "Whether a duty exists is purely a question of law." Id.

"A duty exists when a general type of event or harm is foreseeable." Pierce v. Platte-Clay Elec. Coop., Inc., 769 S.W.2d 769, 776 (Mo.banc 1989). "For purposes of determining whether a duty exists, this Court has defined foreseeability as the presence of

some probability or likelihood of harm sufficiently serious that ordinary persons would take precautions to avoid it." Lopez, 26 S.W.3d at 156. "In determining foreseeability for the purpose of defining duty, *it is immaterial that the precise manner in which the injury occurred was neither foreseen nor foreseeable*." Pierce, 769 S.W.2d at 776. (emphasis in original).

In considering whether a duty exists, a court must weigh: "the foreseeability of the injury, the likelihood of the injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on the defendant." Rothwell v. West Cent. Elec. Co-op., Inc., 845 S.W.2d 42, 43 (Mo.App. W.D. 1992).

In this instance, as argued by Appellants and as held by the Majority, AmerenUE owed a duty to Tiffany Hoffman because it should have foreseen the risk under the circumstances in this case. (Majority, p. 4). The Majority stated:

> It was foreseeable that emergency personnel would delay their attention to the victims of this accident until being informed of the status of the electric current in the power line. Serious harm is likely to result from such a delay, and an ordinary person would take precautions to avoid that harm. UE could have guarded against this risk by simply communicating the information it had in its exclusive possession about the status of the power line.

(Majority, p. 4).

In response, AmerenUE argues that there is no evidentiary basis for imposing a duty based upon foreseeability; there was no evidence that emergency personnel were waiting to

be informed of the status of the electric current. Substitute Brief, p. 31. Contrary to AmerenUE's assertion, however, the evidence shows that on September 19, 1998, within minutes of the collision between Simpson's vehicle and the utility pole, AmerenUE was made aware of the collision, that there were occupants trapped inside the vehicle, and that rescue personnel at the scene were unable to treat the occupants due to the presence of the downed power line on the vehicle. LF at 206; 247, p. 4; 253, pp. 25-26.

This evidences constructive knowledge (if not actual knowledge) that emergency personnel would delay their attention to the victims of the accident until being informed of the status of the electric current in the power line. And at such time, AmerenUE also had information concerning the status of the downed power line. LF at 78-79, pp. 10-15; 81-82, pp. 22-26. This information was solely in the possession of AmerenUE; rescue personnel at the scene did not – and could not – have known such information. LF at 207; 338, p. 3; 348, p. 43; 365, p. 44.

AmerenUE also argues that "[t]he courts have never held that an electric utility acts negligently by having its own personnel remove a downed line, rather than *encouraging* untrained persons to approach the line before the possibility of danger has been eliminated."[1] Substitute Brief, p. 27 (emphasis added). Appellants have never argued

[1] The Majority's imposition of a duty on AmerenUE to communicate information is not violative of prior Missouri precedent as argued by AmerenUE. The cases cited by AmerenUE in support of its position are inapposite to the unique factual circumstances of this case.

AmerenUE had a duty to encourage. Rather, Appellants argue Union Electric merely had a duty to inform. The Majority recognized this distinction:

> We do not hold that UE should have advised emergency personnel that the situation was safe when it was not or that UE should encourage emergency personnel to take any particular action. But that does not mean that UE should not have given emergency personnel any information about the line.

(Majority, p. 4).

The Dissent states: "I would hold that AmerenUE . . . did not have a duty to advise by radio or telephone or some other remote means, the rescue personnel at the scene of that accident that the power line was not energized *and thus safe for removal*, when there were conditions unknown to AmerenUE that could render this advisement false and thus place the lives of the rescue personnel in danger." (Dissent, p. 13) (emphasis added). Respectfully, the Dissent mischaracterizes the Majority's holding. The Majority, as shown above, explicitly states that AmerenUE was not under a duty to advise emergency personnel it was safe. The Majority merely held AmerenUE had a duty to convey information in its sole possession so that rescue personnel at the scene could better decide how to proceed.

With respect to public policy, AmerenUE argues that imposing a duty on a utility company to communicate information is contrary to public policy because such a duty would expose emergency personnel to dire consequences such as the risk of serious injury or death. Substitute Brief, p. 33. But what about those who are in need of rescuing? Those persons like Tiffany Hoffman who are suffering from serious injury and require immediate

help? The Court must not forget these persons. The failure to communicate in this instance resulted in dire consequences – the inability of Tiffany Hoffman to receive life-sustaining treatment and ultimately her death. LF at 346, p. 36.

There is no doubt that working with electricity is dangerous. But rather than keep this information secret, such information should have been conveyed to rescue personnel at the scene. As the Majority stated: "The more informed emergency personnel are, the better able they are to assess the risks at an accident scene and protect themselves and members of the public. That may mean that they choose to avoid the risk." (Majority, pp. 4-5). On September 19, 1998, however, emergency personnel at the scene did not have a choice; such personnel could do nothing but wait for AmerenUE.

II. AMERENUE'S ARGUMENT THAT THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AMERENUE FOR THE ADDITIONAL REASON THAT PLAINTIFFS' THEORY OF LIABILITY WAS BASED ON PURPORTED EXPERT TESTIMONY THAT DID NOT MEET THE REQUIREMENTS OF SECTION 490.065 RSMO SHOULD BE DENIED OR DISREGARDED, BECAUSE SUCH ARGUMENT VIOLATES RULE 83.08(b) OF THE MISSOURI RULES OF CIVIL PROCEDURE, IN THAT AMERENUE ALTERED THE BASIS OF ITS ARGUMENT CONTRARY TO THE PROVISION OF SAID RULE, WHICH STATES A PARTY SHALL NOT ALTER THE BASIS OF ANY CLAIM THAT WAS RAISED IN THE COURT OF

APPEALS BRIEF.

Rule 83.08(b) of the Missouri Rules of Civil Procedure states in pertinent part: "The substitute brief shall conform with Rule 84.04, shall include all claims the party desires this Court to review, *shall not alter the basis of any claim that was raised in the court of appeals brief* . . . ." (2005) (emphasis added).

In AmerenUE's court of appeals brief, it argues: "Mr. Roelle's personal opinion is insufficient to *create* a duty, and the court properly granted summary judgment in favor of AmerenUE for this additional reason." Respondent's Brief, p. 27 (emphasis added). In AmerenUE's substitute brief, however, it recognizes that the determination of whether a duty exists is a question of law for the court and not dependent on expert testimony.[2] Substitute Brief, p. 36. Thus, AmerenUE alters the basis of its claim and asserts instead that "Mr. Roelle's personal opinion is insufficient to create a triable issue of *breach* of duty, and the court properly granted summary judgment in favor of AmerenUE for this additional reason." Substitute Brief, p. 40 (emphasis added).

AmerenUE's argument before this Court concerns breach of duty rather than creation of duty and is therefore different than that presented to the court of appeals. Such argument is in violation of Rule 83.08(b) and should be denied or disregarded by this Court.

III. THE APPELLATE COURT PROPERLY REVERSED THE GRANT

[2] Appellants, in their court of appeals reply brief, referenced Parra v. Building Erection Services, which held: "whether a duty exists is not a question for expert testimony . . . ." 982 S.W.2d 278, 284 (Mo.App. W.D. 1998)

OF SUMMARY JUDGMENT ISSUED BY THE TRIAL COURT IN FAVOR OF AMERENUE, BECAUSE APPELLANTS CAN ESTABLISH CAUSATION, IN THAT TESTIMONY FROM EMERGENCY PERSONNEL EVIDENCES THAT AT LEAST ONE OF THE WORKERS AT THE SCENE WOULD HAVE ATTENDED TO TIFFANY HOFFMAN WITHOUT WAITING FOR AMERENUE TO REMOVE THE LINE HAD HE BEEN INFORMED AS TO THE STATUS OF THE LINE.

Rescue personnel arrived at the scene at 9:59 p.m. (21:59). LF at 335. Dean Merritt, an AmerenUE construction supervisor, arrived at the scene at 10:25 p.m. (22:25). LF at 30; 117, pp. 22-24. At or about 10:33 p.m. (22:33), Merritt removed the power line from the vehicle with a fiberglass pole he obtained from the fire department. LF at 30; 117, p. 23. During the approximately thirty (30) minutes rescue personnel were at the scene prior to the arrival of Merritt, fire personnel at the scene possessed the means necessary to remove the line from the vehicle.[3] LF at 266, p. 23.

Testimony from paramedic Fales unequivocally indicates that he would have extricated Tiffany Hoffman from the vehicle and provided medical treatment to her had he known the line did not conduct electricity. LF at 207; 348, pp. 44-45. Paramedic Fales' testimony and the fact that the fire department had the necessary means for removing the

[3] Indeed, the fiberglass pole used by Merritt to finally remove the line was obtained from the fire department. LF at 266, p. 23.

power line establish that a material issue of fact exists as to whether or not Tiffany Hoffman would have been afforded timely medical treatment had rescue personnel been informed of the status of the power line. As held by the Majority: "This is sufficient to show that, had UE provided emergency personnel with the information in its possession, at least one of the workers on the scene would have been willing to proceed with assisting Hoffman without waiting for UE to remove the line." (Majority, pp. 5-6).

The Majority then addressed the deposition testimony of the fire captain, Joseph Lee Maddick, wherein he stated that the line would have to be removed from the vehicle before emergency personnel would provide treatment:

> Evidence that the captain of the fire department would not have assisted Hoffman until the line was removed because he would not injure any of his firefighters, even if UE told him that the line was dead, may suggest that the willing firefighter would have been ordered not to proceed to assist the victim until UE arrived. But that goes to the weight of that firefighter's testimony – as does any speculation about what he would have done if told of the remote possibility that the line could re-energize. It does not establish UE's right to summary judgment.

(Majority, p. 6).

Per the Majority, and as argued by Appellants, Paramedic Fales' testimony – regardless of that offered by Captain Maddick – establishes a material issue of fact and is sufficient to withstand AmerenUE's motion for summary judgment.

CONCLUSION

The Majority's imposition of a duty upon AmerenUE to communicate information in its sole possession to better assist rescue personnel at an accident scene is sound and logical. The Majority did not impose a duty to assure safety when safety cannot be assured. As noted by the Majority, once equipped with information, rescue personnel can make the choice as to whether to avoid the risk. But to deny rescue personnel information is to deny them the choice to act. And such a denial can, and indeed did in this instance, lead to the death of a victim in distress who, had she been provided with treatment sooner, would have lived.

AmerenUE's argument concerning the testimony of Appellants' expert witness, Wayne Roelle, should be denied or disregarded because it violates Rule 83.08(b), and Paramedic Fales' testimony is sufficient to create a material issue of fact for withstanding summary judgment.

WHEREFORE, for the reasons set forth herein and in Appellants' appellate brief, for which a substitute brief was not submitted to this Court, appellants Theodore J. Hoffman and Deborah L. Hoffman respectfully request this Court make and enter its Order affirming the Opinion of the Majority, reversing the trial court's granting of AmerenUE's motion for summary judgment, and remanding this cause to the Circuit Court of the City of St. Louis for reinstatement and further proceedings.

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on the word processing program by which it was prepared, contains 2,939 words, exclusive of cover, the Certificate of Service, this Certificate of Compliance, the signature block, and Appendix.

The undersigned further certifies that the diskette filed herewith containing the Substitute Reply Brief of Appellants in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

A true copy of the foregoing has been served upon all parties by depositing the same in the United States mail, postage pre-paid, this 14th day of June, 2005, as follows: Mr. James J. Virtel and Ms. Ann E. Buckley, attorneys for Respondent, One Metropolitan Square, Suite 2600, St. Louis, Missouri 63102; Mr. John J. Benge, attorney for Appellants, 4310 Madison Avenue, Suite 200, Kansas City, Missouri 64111.

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Subscribed and sworn to before me this ____ day of June, 2005.

Notary Public

My commission expires: